

Patrick Nolan
United States Patent and Trademark Office
Washington, D.C. 20231
1/23/2008

Dear Mr. Nolan,

Thank you very much for our lengthy discussion last week regarding application 09/287,478. You gave me some comfort that I will be able to keep this application alive, despite all the missteps. The key messages I took from our discussion was that the CFR are rules, not statutes, and as such may be petitioned or waved, and that only the examiner abandons prosecution whereas the BPAI has jurisdiction over appeals.

There is a question in my mind, however, as to whether the examiner can procedurally prevent the BPAI from ever receiving the patent, by means of Non-Compliance. I have faxed an appeal brief last night, without Petition to Revive from Unintentional Abandonment, in order to solicit the examiner's opinion of it. I was unable to speak with the examiner last week and until today when we had a reasonably clear communication (see below, note to Vincent Trans). He disavows responsibility for the Notice, and claims that I should file an amendment with a Petition for Revival as soon as possible, or he will abandon the application. Based on what we discussed, I'm not sure this makes sense, and I wanted to confirm with yourself. Mr. Trans had a recommendation to file an RCE instead of an appeal brief, but per S1215.01 I had concerns of express abandonment.

As you can imagine, the appeal process and MPEP are complicated enough for a Pro-Se, and we are easily led astray. I am still working to understand the basics with appeals, and now feel I must triple check everything I hear with the MPEP, the statutes and the case law, and this is overwhelming. Is there some mechanism I can use within the USPTO to petition for a written explanation (hopefully of probative value!) of how to definitively extricate myself from my current predicament?

Thank you,
Chris Rode
Applicant, PRO-SE 09/287,478

Vincent Trans
Special Programs Examiner
United States Patent and Trademark Office
Washington, D.C. 20231
1/23/2008

Dear Mr. Trans:

You and I spoke last week about application 09/287,478. Because I was having great difficulty understanding the many issues, and unable to contact the examiner regarding issues raised in his notice of non-compliant amendment, I had decided to file an RCE, as you had suggested. Unfortunately after reading section 1200 regarding filing an RCE during the appeal process, I became concerned about issues of express abandonment, which is not petitionable. So in haste I made amendments to my previous brief and faxed that to the Central Fax number. I didn't file a petition to revive from unintentional abandonment because I still don't know that I can do that until the examiner abandons the application. He seems to think that both the 5 month extension and the revival fees are due, but this is not true, of course, if the application was previously abandoned, so I need to know if that is in fact the case.

I did make contact with the examiner and we had reasonably good communication. In filing his Notice of Non-Compliant amendment, he had relied on a patent appeals specialist within the Art Unit, and is now very busy with other applications and so is unable to look at my amendment to see if it successfully addresses the concerns raised therein. He did not want to give me the appeal specialist's name, but suggested that you are the right person to ask these questions.

I question nearly all, and perhaps all of the stated reasons for non-compliance in the Notice, and have explicated my reasons in the recently amended and filed Brief (as grounds to be reviewed). As we discussed previously, items 4 and 5 do not apply to Pro-Se's and item 1 would appear to be erroneous. Item 10 doesn't seem to make any sense as they are not opinions but objective fact submitted to traverse a ground of rejection.

The biggest question is one of standing – I did not feel I could file a petition for revival from abandonment if the patent is not in fact abandoned. If it is abandoned, what is the effective date of abandonment? If you recall, there was a potential problem with abandonment of the brief and the application due to initial non-payment of the appeal fee, which was expeditiously corrected. I have been told that if the patent is revived, the appeal will be reinstated as well to 1/19/2007.

Thank you,
Chris Rode

Rode Consulting, Inc.

Applicant, PRO-SE 09/287,478